

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Submitted on Briefs, April 23, 2008

DOUGLAS TOMANELLI v. NANCY TOMANELLI

**Direct Appeal from the Circuit Court for Hamilton County
No. 05 D 1467 Hon. W. Jeffrey Hollingsworth, Circuit Judge**

No. E2007-01864-COA-R3-CV - FILED JULY 22, 2008

The Trial Court in this divorce action overruled the wife's Motion for attorney's fees and litigation expenses. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

John R. Meldorf, III., Hixson, Tennessee, for appellant.

Lisa Z. Bowman, Chattanooga, Tennessee, for appellee.

OPINION

In this divorce action the wife appealed the refusal of the Trial Court to award her reasonable attorney's fees and certain costs pursuant to Tenn. R. Civ. P. 54.04(2).

Background

The husband filed for divorce on August 10, 2005, alleging irreconcilable differences and that the wife was guilty of inappropriate marital conduct. The husband sought the care and custody of the children. The Complaint alleged the wife had left the marital home with the children on July 30, 2005 and was staying in the home of Don and Rita Britton. The Complaint stated the wife was under the influence and control of Don Britton who was the leader of a small "fellowship" of about five couples. The husband stated that he feared that his children were in danger while in the care of the wife because she was under the control of Mr. Britton, and that the wife had used stringent and unreasonable methods of discipline with the children.

On August 9, 2005 the wife filed a Complaint for Legal Separation in the Chancery Court, and alleged the husband was guilty of inappropriate marital conduct including exerting control over herself and the children and physically acting out in anger to the point she had called the police. She asked for a legal separation, and that she be granted primary custody of the children, and be restored to residing in the marital home. She sought temporary and permanent support for herself and the children, including attorney's fees.

The Court issued a Temporary Restraining Order on August 9, 2005 restraining the husband from contact with the wife, and required the husband to strictly abide by the temporary parenting plan and to vacate the marital home. Mediation of the parenting issues was ordered, and the Chancery case was transferred and consolidated with the Circuit Court case. A Final Report of Mediator was filed on August 23, 2005, reflecting that the parties had mediated on August 19, 2005 and a temporary parenting agreement had been reached. An Order modifying the Temporary Restraining Order was entered to reflect the mediated Memorandum of Understanding on September 29, 2005. The Memorandum reflects that the parties agreed to put the divorce on hold for six months and to work on marital therapy in an attempt to reconcile.

A hearing was held on August 29, 2005 on the wife's Motion for Alimony Pendente Lite and the husband's Motion to Vacate the Temporary Restraining Order. The husband was ordered to continue to pay the mortgage and utilities on the marital home and to pay the wife \$200.00 a week. The parties' effort to reconcile failed and a series of pretrial motions were filed by both parties during the time leading up to the actual trial of the divorce proceeding in March of 2007. The parties conducted extensive written discovery and at least sixteen depositions were taken.

The husband's motion to determine whether the children should be prevented from spending any time with Don and Rita Britton was heard on September 11, 2006, and the evidence established that Mr. Britton was the leader of a home-based Christian fellowship of approximately five families that the wife attended. Mrs. Britton was also involved in the fellowship and was the leader of a women's discussion group. The husband maintained that the Brittons were proponents of rather harsh methods of child discipline that the wife had adopted, and the husband believed that his children were at risk of harm if they were permitted to interact with the Brittons. The hearing was lengthy and the wife presented twenty witnesses, in addition to her own testimony and the testimony of six witnesses who testified at the September 11 hearing on her behalf. She also called an expert in the field of occupational therapy from New York University by deposition; an expert on cults from Montreal, Canada, an expert on traumatic stress, an expert play therapist, an expert psychologist, a private detective, three nurse midwives and the husband's girlfriend. In contrast, the husband called six witnesses at trial, all of whom offered expert testimony.

The Trial Court on May 25, 2007, granted a divorce to the wife based on inappropriate marital conduct of the husband, and named the wife as the primary residential parent with liberal visitation rights to the husband. The Court ruled that the wife could take the children to the home-based fellowship but she was not to leave the children at the Britton home overnight unless she was present. The parents were ordered to attend individual counseling on parenting with

each party to bear the cost of his or her own counseling, and the husband was ordered to pay child support based on his monthly gross income of \$4,333.33. The Court then made a division of the marital assets, and as to debts, the husband's student loan of \$98,000.00 was his separate debt, and he was also held responsible for the marital debt of \$27,702.77. The Court stated that although the husband received substantially more of the marital property he was liable for the marital debt, and it was uncontroverted that the wife's student loan of \$30,000.00, which was her separate debt, had been paid for with marital funds.

The Court held the wife was entitled to rehabilitative alimony, and that the husband had a good earning capacity as a chiropractor and the wife, who was unemployed, had left her career as an occupational therapist to be a stay at home mother. The wife was no longer licensed and would require additional training to regain her license. The husband was to pay rehabilitative alimony of \$1,000.00 a month until December 31, 2009, which would give the wife time to regain her occupational therapist license, and from January 1, 2010 to December 31, 2011, the husband was to pay \$500.00 a month which would help sustain the wife until she is reestablished in her career. Court costs were assessed to the husband.

The wife then filed a motion for the husband to pay the expenses, attorney's fees and discretionary costs associated with the divorce action through May 30, 2007. She claimed \$59,977.75 as attorney's fees, discretionary costs were stated to be \$25,074.12 and other expenses were \$1,050.22, for a total of \$86,092.09. The husband also filed a Motion to Alter or Amend on June 7, 2007 regarding the final judgment of divorce which found him at fault, the visitation schedule in the parenting plan, the rehabilitative alimony schedule, the division of marital property, and the children's contact with the Brittons.

On July 18, 2007, the Court entered an Order in response to both parties' post-judgment motions. The Court granted the motions regarding the parenting plan and the husband's request that he be allowed to file a motion to modify child support when the wife started working. The wife's request for attorney's fees and costs, were not specifically mentioned in the Order and were not granted in the Amended Final Decree. The wife has appealed.

Issues on Appeal

The wife's appeal raises these issues:

- A. Whether the Trial Court abused its discretion in failing to award appellant/defendant her reasonable attorneys' fees and costs?
- B. Whether the Trial Court abused its discretion in failing to award appellant/defendant certain costs associated with the litigation?

Discussion

This Court reviews a trial court's findings of fact in a divorce case *de novo* with the presumption that the trial court's factual determinations are correct unless the evidence preponderates against such factual determinations. *Brooks v. Brooks*, 992 S.W.2d 403,404 (Tenn.1999). An award of attorney's fees in a divorce case is a matter within the sound discretion of the trial court. *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn.1995); *Byrd v. Byrd*, 184 S.W.3d 686, 693 (Tenn. Ct. App.2005); *Wilder v. Wilder*, 66 S.W.3d 892, 894 (Tenn. Ct. App.2001). On appeal, this Court will interfere with such award only when there is an abuse of discretion, which is an especially deferential standard. *Byrd*, 184 S.W.3d at 693; *Threadgill v. Threadgill*, 740 S.W.2d 419, 426 (Tenn. Ct. App.1987). The appellant bears the burden of showing an abuse of discretion with proof that the evidence preponderates against the award and that a "manifest injustice" will occur if the trial court's decision is allowed to stand. *Wilder*, 66 S.W.3d at 894.

The trial court's conclusions of law are reviewed under a purely *de novo* standard with no presumption of correctness. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005).

The wife argues first that the husband's aggressive, highly litigious actions during the course of the protracted litigation required the wife to defend herself, her friends, her religious beliefs and her parenting philosophy in a vigorous manner, which drove up her attorney's fees and litigation costs to over \$86,000.00. The wife points to the husband's insistence that he was the more appropriate primary residential parent, his efforts to show she belonged to a cult, his frequently filed motions, his noncompliance with the rules of discovery and his efforts to block her Amended Complaint which added the allegation of adultery. The wife also contends that as an award of attorney's fees is considered alimony in solido, the Trial Court erred as a matter of law when it did not apply the factors contained in the alimony statute, Tenn. Code Ann. §35-5-21(I).

This Court has addressed the wife's first contention in *Gilliam v. Gilliam*, 776 S.W.2d 81, 86 -87 (Tenn. Ct. App. 1989). There the Court affirmed the trial court's order for the husband to pay \$32,000.00 of the wife's attorney fees because the amount of the fees was brought about mainly by the litigious conduct of the husband and obstructionist tactics and legal maneuvers in which he engaged over a period of months. *Id.* at 86. In *Gilliam* the court found that the husband had used the judicial process as a retaliatory weapon, with examples of his bad conduct by abusing the discovery process, the use of evasive tactics, false responses in written discovery and in depositions, attempts to hide assets, false allegations and complete unwillingness to cooperate with the wife and her counsel, and raised frivolous and false claims against the wife, which forced her to undertake extensive and expensive investigations. The Court of Appeals viewed the facts presented in *Gilliam* as unusual and remarked that its holding in that case was not meant to indicate "that a litigant should not be free to fight his cause with zeal to the extent necessary to prevail." The facts in this case are readily distinguishable from those of *Gilliam*. Dr. Tomanelli did not employ the type of obstructionist tactics as evidenced in *Gilliam*. The record does not support the wife's position the husband's actions were the sole cause of the protracted litigation or that the husband's actions were the main cause of the wife's high legal fees. The record does demonstrate that an unusually large number of motions were filed, considering the divorce proceeding was fairly straightforward and the

modest size of the marital estate. However, the wife filed twenty-two of the thirty-five motions and only two of the wife's motions were related to the husband's non-compliance with discovery rules. Both the husband and wife initiated discovery and trial depositions and both engaged multiple experts to support their respective cases. The testimony at the September 11, 2006 hearing was an all day affair and the transcript shows that both the husband and wife vigorously defended their positions on the issues. The wife presented twenty witnesses at trial, many by deposition, and she would have presented at least five more had the Trial Court not stopped the parade of cumulative testimony as to the wife's good character and the husband's bad character and bad acts. In contrast, the husband put on six witnesses, all of whom were experts.

The wife's contention that the husband dragged out the litigation and increased her cost of defense with unfounded theories regarding the Brittons, whether the home-based fellowship was a cult and whether the husband should be named the primary residential custodian is without merit. The husband had the right, as much as the wife to persuade the Court that he should be named the residential parent and to seek control of various aspects of the children's lives such as where they lived and went to school. The Court found some legitimacy in the husband's concerns regarding the children's contact with the Brittons, as in the Trial Court's Opinion, the Court limited the children's contact with the Brittons at the September 11, 2006 hearing, as well as in the Final Decree of Divorce. Also, the wife brought in an expert from New York University to testify regarding the wife's employment opportunities as an occupational therapist when she already had a competent local expert who testified on that issue. The wife also went to the seemingly unnecessary expense of hiring a private investigator to "stake out" the home of the husband's girl friend, apparently in an effort to show that the husband spent time there. The wife undertook this expense even though the husband and his girl friend could and did testify regarding their relationship and to the fact that they were expecting a child together.

Based on the foregoing, it is reasonable to conclude that while the divorce proceeding was protracted and the wife's attorney's fees and costs are higher than is often seen in divorces involving similar sized marital estates and similar issues, both parties equally contributed to the situation. Thus the wife's contention that the husband should be responsible for her fees and costs because of his supposed litigious activities is without merit. See *Eldridge v. Eldridge* 137 S.W.3d 1, 25 (Tenn. Ct. App. 2002); *Raulston v. Raulston*, No. E2005-2463-COA-R3-CV, 2006 WL 2737996 at * 4 (Tenn. Ct. App. Sept. 26, 2006).

The wife further argues that had the Trial Court considered the alimony factors set out in Tenn. Code. Ann. §36-5-121(I), the Court would have ordered the husband to pay her attorney's fees and costs. When deciding whether an award of attorney's fees is appropriate a trial court must consider the same factors that are used when considering an award of alimony. *Morrow v. Morrow*. No. M2003-02448-COA-R3-CV, 2005 WL 1656825 at * 10 (Tenn. Ct. App. Jul. 14, 2005); *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995).

It is well accepted the factors that are most important in evaluating whether an award of attorney's fees is appropriate are the disadvantaged spouse's need and the advantaged spouse's ability to pay. *Martin v. Martin*, M2002-02350-COA-R3-CV, 2004 WL 833083 at *10 (Tenn. Ct. App. Apr. 16, 2004); *Waters v. Waters*, 22 S.W.3d 817, 821 (Tenn. Ct. App.1999). The award of attorney's fees is largely in the discretion of the trial court, and an appellate court will not overrule unless there is a clear showing of abuse of that discretion. *Sandlin v. Sandlin*, No. M2003-00775-COA-R3-CV, 2004 WL 1237273 at *5. Under the abuse of discretion standard, the Court of Appeals will uphold the ruling of a trial court as long as "reasonable minds can disagree as to the propriety of the decision made." A trial court abuses its discretion only if it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining". *Eldridge v. Eldridge*, 42 S.W. 3d 82, 85 (Tenn. 2001).

In this case the wife received \$82,790.00 in marital assets and at the time the appeal was filed had no income other than the rehabilitative alimony of \$1,000.00 a month. She did not have any separate funds. Her plan was to have her occupational therapist license reactivated by taking continuing education course and seek employment once the youngest child started school. The Trial Court found that her earning capacity is upward of \$65,000.00, based on her last year of earning in 2000. However, the wife's obvious need is only half of the equation as the husband's ability to pay the legal expenses must also be considered. According to his Income and Expense Statement, the husband's gross yearly income is approximately \$75,000.00. He was awarded \$46,025.00 in marital assets (if only the equity in the business condo is included and not the mortgage) but he also is responsible for his separate debt of \$98,000.00 and \$27,702.77 in marital debt. He is responsible for child support and for alimony through 2011. Based on his income and his substantial financial responsibilities, it appears that the husband does not have the ability to pay the wife's legal fees and expenses. Moreover, when the factors contained in Tenn. Code Ann. 36-5-121(I) are weighed in view of the husband's and wife's positions, an award of alimony *in solido* of attorney's fees is not mandated. We conclude that in view of the circumstances of the parties, the Trial Court did not abuse its discretion when it denied the wife's request that her legal fees be paid by the husband.

The wife contends that the Trial Court erred when it did not order the husband to pay her costs associated with the divorce litigation. She argues that as the prevailing party she is due these costs pursuant to Tennessee Rule of Civil Procedure 54.04(2). The wife's counsel asserted in his affidavit attached to the Motion for Discretionary Costs that the discretionary costs included "expert witness costs, deposition costs, court reporter fees and consulting experts for legal services in the amount of \$25,074.12. The affidavit did not break down the dollar amount associated with each of the listed activities nor does it offer further explanation as to what the "consulting experts for legal services" entailed.

Tennessee Rule of Civil Procedure 54.04(2) authorizes trial courts to award the prevailing party certain litigation expenses. These expenses include "reasonable and necessary court

reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials, and guardian ad litem fees.” The purpose of awarding these costs is not to punish the losing party but to make the prevailing party whole. *Owens v. Owens*, 241 S.W.3d 478, 496-497 (Tenn. Ct. App. 2007). A prevailing party is not automatically entitled to an award of discretionary costs under this rule, *Benson v. Tennessee Valley Elec. Coop.* 868 S.W.2d 630, 644 (Tenn. Ct. App.1993), however, courts generally award discretionary costs if they are reasonable and if the party requesting them has filed a timely, properly supported motion satisfying the requirements of Tenn. R. Civ. P. 54.04(2). *Scholz*, 40 S.W.3d at 84. An award of discretionary costs lies within the discretion of the trial court. *Sanders v. Gray*, 989 S.W.2d 343, 345 (Tenn. Ct. App.1998).

The wife did not properly support her motion for discretionary costs as she gave no details regarding the allocation of costs for court reporter fees, expert depositions or expert testimony. Based on this lack of information, the Trial Court could not determine if the costs requested were either reasonable or necessary. Moreover, the wife described some of the costs to be attributed to “consulting legal services rendered to Defendant” without further explanation. We have interpreted Rule 54.04(2) as limiting the types of expert witness fees that can be recovered as discretionary costs by the prevailing party. A prevailing party cannot recover expert fees for deposition or trial preparation even if the fees are reasonable and necessary. *Mass. Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 38 (Tenn. Ct. App.2002). Whatever the “consulting legal services” referenced in the wife’s counsel’s affidavit refer to, they are not recoverable by the wife from the husband as this type of service is not specifically listed in Rule 54.04(2). The wife failed to provide the Court with sufficient information regarding the costs she sought to recover for the Court to determine whether the costs fell within the provisions of Rule 54.04(2) and also whether the costs were reasonable and necessary. We hold the Trial Court did not abuse its discretion in refusing to require the husband to pay these costs.

For the foregoing reasons, the Judgment of the Trial Court is affirmed and the cause remanded, with the cost of the appeal assessed to Nancy Tomanelli.

HERSCHEL PICKENS FRANKS, P.J.